tution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review – a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the State and between individuals *inter se*, and in performing their constitutional role they must of necessity and strictly in accordance with the Constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action. If that role of the judiciary is appreciated then it will be seen that the courts have a duty to perform in accordance with the oath taken by judges to uphold the Constitution and act within the provisions of and in accordance with the law.

We trust that any misunderstanding as to the role of the courts will accordingly be dispelled, and in this context and against the background of what we have just said, there is no call to be overly hypersensitive and to overact impetuously as the impugned remarks do not *ex necessitate* connote, within the requisite of the strictest burden of proof for proceedings for contempt, an attack on the judiciary in the way suggested by the applicant but rather tend to ventilate, perhaps understandably, the vexation of the executive in not being able to get through some desired objective or end without curial intervention.

In the circumstances we have adumbrated we are of the view that this is not a case where leave should be given to apply for committal proceedings for contempt of court, and we accordingly dismiss this appeal.

Appeal dismissed.

Solicitors: *Karpal Singh & Co.*

TAN KHIEN TOONG & ORS. v. HOONG BEE & CO.

[S.C. (Wan Suleiman, Seah & Hashim Yeop A. Sani S.C. JJ.) December 6, 1984 & October 18, 1986]

[Kuala Lumpur – Federal Court Civil Appeal No. 126 of 1984]

Contract – Landlord and Tenant – Agreement for tenancy of premises – Tenant to enjoy uninterrupted possession so long as he pays rents regularly – Payment of premium alleged but not proved – Agreement not registered – Equitable estoppel – Application of equity – Civil Law Act, 1956 (Act 67), s.3(1)(a).

Landlord and Tenant – Agreement not registered – Tenants at will – Tenancy from month to month – Notice to quit – Termination – No valid defence.

In this case the relevant facts were that on March 31, 1962 an agreement in writing was entered into between Tan Kwan, the landlord (since deceased) of the one part and Hoong Bee & Co., the tenants (respondents herein) of the other part, whereby the tenants were let into possession of the whole of the ground floor of the shop premises known as No. 171-D, Jalan Rahang, Seremban, at the monthly rental of $170.00 as from April 1, 1962. Clause 2 provides that "so long as the tenants shall pay the monthly rental of the demised premises punctually and promptly on the first day for every month and in any event not later than the fourteenth day of any month, and strictly adhere and abide by the terms and conditions contained herein, the tenants shall enjoy uninterrupted occupation of the demised premises, and the landlord shall not hinder, obstruct or determine the tenants' right to such enjoyment under any circumstances." This agreement shall be binding on the heirs, executors, administrators and assigns of the landlord and also on the successors, administrators and executors of the tenants (see clause 7). The respondents went into occupation of the shop premises and paid the monthly rent of $170.00 to the landlord, Tan Kwan. After the death of Tan Kwan, the appellants became the registered co-owners of the shop premises and accepted the rent tendered by the respondents. As a result, the legal relationship of landlord and tenant was created between the parties. It was conceded that the written agreement of March 31, 1962 was never registered at the Land Registry office.

The appellants claimed that the respondents were monthly tenants and on May 19, 1978 they instructed solicitors to send a notice to quit to the respondents terminating their tenancy on July 31, 1978. When the respondents refused to vacate from the shop premises the appellants took action in the Magistrate's Court at Seremban for an order for possession and other incidental reliefs.

The crux of the defence of the respondents was that by reason of their having paid $9,000.00 as premium to the late Tan Kwan they were given a tenancy in terms of clause 7 aforesaid. Even though the agreement of March 31, 1962 was not registered they contended that they were induced by the late Tan Kwan to pay the money over in the expectation of being allowed to stay there indefinitely so long as they paid the rental regularly. They therefore invoke the principle of equity to protect them

so that an injustice might not be perpetuated by the appellants who are the successors-in-title of the shop premises.

The High Court gave judgment in favour of the respondents.

The question raised in the appeal was whether the High Court was right to apply the principle of equitable estoppel to the facts of the case, and whether the agreement was enforceable in equity.

Held, by a majority (Wan Suleiman S.C.J. dissenting): (1) in order to raise the equitable estoppel against the appellants it was incumbent on the respondents to show that in 1962 they were induced by the late Tan Kwan (landlord) to pay over the $9,000.00 to him under an oral agreement or promise that the respondents would be allowed to remain in the ground floor of the shop premises as long as they liked subject only to the payment of the monthly rent regularly and promptly. The onus of establishing this payment and oral promise rested on the respondents and on the findings of the court below, they had failed to discharge it;

(2) the agreement in this case was void as a lease on the ground of non-registration. Since the respondents had entered into possession under a void lease without any objection from the landlord the legal relationship of landlord and tenant arose and the respondents became tenants at will. When rent was tendered and paid monthly and accepted, the tenancy at will was converted into a tenancy for month to month. This monthly tenancy was duly determined by the notice to quit and there was therefore no valid defence to the claim of the appellants.

Cases referred to:

(1) *Siew Soon Wah* v. *Yong Tong Hong* [1973] 1 M.L.J. 133. P.C. ; [1971] 2 M.L.J. 105 F.C.
(2) *In re King's Leasehold Estates* (1873) L.R. 16 Eq. 521.
(3) *Ramsden* v. *Dyson* (1866-67) L.R. 1 H.L. 129, 170.
(4) *United Malayan Banking Corporation Bhd. & Anor.* v. *Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 M.L.J. 87.
(5) *Tan Swee Hoe Co. Ltd.* v. *Ali Hussain Bros.* [1980] 2 M.L.J. 16.
(6) *Plimmer* v. *Wellington Corporation* (1884) 9 App. Cas. 699.
(7) *Ahmad Yar Khan* v. *Secretary of State for India* (1901) 28 I.A. 211.
(8) *Chalmers* v. *Pardoe* [1963] 3 All E.R. 552.
(9) *Inwards* v. *Baker* [1965] 1 All E.R. 446.
(10) *Lee Ah Low* v. *Cheong Lep Keen & Anor.* [1970] 1 M.L.J. 7.
(11) *Margaret Chua* v. *Ho Swee Kiew & Ors.* [1961] M.L.J. 173.

SUPREME COURT.

Leow Shin Fong for the appellants.

P.S. Gill for the respondents.

Cur. Adv. Vult.

Wan Suleiman S.C.J. (dissenting): I shall not deal with the facts leading up to this appeal which have been most comprehensively dealt with in the judgment of my learned brother Datuk George Seah.

I wish, however, to say that whilst it is true that in paragraph 3(ii) of his defence the respondent did claim that he had paid a premium of $9,000/–, it will be inaccurate to say that that is the crux of the defence.

At paragraph 3(iv) it should be noted that the respondent also said that he "will refer to the said Agreement at the trial, for its meaning and legal effects thereto both in law and in equity."

The learned judge noted that whilst respondents/tenants alleged in evidence, through DW 1, the only witness called by the respondents before the Magistrate, that payment of premium amounting to $9,000/– had been made to the landlord, the same witness agreed that there was no documentary proof, because appellants had insisted on documentary proof, so that a person called Ong Kin Thong, who had presumably witnessed the payment of the $9,000, was not called to testify by the respondents. I would respectfully agree with the learned trial Judge that the failure to call such witness is not fatal for the reasons given by his Lordship, as set out here *in extenso:*

"In my view, it is now deeply entrenched in our law also that an agreement purporting to grant or lease of land can be enforceable in equity even though such an agreement is void as a lease at law. I need only mention the well-known and often-quoted cases without having, in all cases, to refer to the facts therein. They are *Margaret Chua* v. *Ho Swee Kiew & Ors.* [1961] M.L.J. 173; *Siew Soon Wah* v. *Yong Tong Hong* [1973] 1 M.L.J. 133; *Ong Heng Hwa Realty Sdn. Bhd.* v. *Teoh Chai Siok* [1977] 1 M.L.J. 124; *In re King's Leasehold Estates* (1873) L.R. 16 Eq. 521; *Parker* v. *Taswell* (1858) 2 De. G. & J. 559; 44 E.R. 1106; *Martin* v. *Smith* (1874) 30 L.T. 268; *Zimbler* v. *Abrahams* [1903] 1 K.B. 577. In *Siew Soon Wah's* case (*supra*), being an appeal from our Federal Court, the Privy Council cited with approval, the case of *In re King's Leasehold Estates (supra),* and in the latter case, the tenant was promised that so long as he paid rent when due, the rent would not be increased, neither a notice to quit would be issued, it was held that a tenant with such an agreement would not be allowed by the court to be turned out of possession though he had no defence in law. In the case of *Zimbler* v. *Abrahams (supra),* the agreement or document with the tenant was in the following words:–

> 'I agree not to raise Mr. Abraham any rent as long as he lives in the house and pays rent regular. I shall not give him notice to quit. Any time Mr. Abrahams wishes to move out, I promise to return him the 6*l*, he has paid me on taking possession of the house.'

The house was expressly let at a weekly rent. The tenant was treated by the landlord there as a weekly tenant and served with a notice to quit. It was held that the document could not be treated as creating a weekly tenancy and though it was void for not being by deed for attempting to create a demise for life, the defendant was entitled to specific performance for a lease for life subject to the two conditions of paying rent regularly and of his determining his life interest by moving out. If he was entitled to specific performance, it was held further that it followed that he was not liable to be ejected.

The principle must have been based on what Syed Agil Barakbah J. (as he then was) said in *Ong Heng Hwa's case* (supra) at page 127, to quote:–

> 'The net result of all these authorities points to the conclusion that a contract, wherever possible, should be construed so that the intention of the parties may be carried out rather than frustrated.'

In other words, equity looks at that as done which ought to be done.

The principle deductible from the above cases must be clearly set apart and distinguished from another principle of equity which as explained by Lord Kingsdown in *Ramsden* v. *Dyson* (1865) L.R. 1 H.L. 129, 170 in these words:-

> 'If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation ...'

This principle was followed or approved repeatedly in a large number of cases, notably in the Privy Council case of *Plimmer* v. *Mayor etc. of Wellington* (1884) 9 App. Cas. 699; *Errington* v. *Errington* [1952] 1 K.B. 290; *Inwards* v. *Baker* [1965] 1 All E.R. 446; *Chalmers* v. *Pardoe* [1963] 3 All E.R. 552; and our Federal Court cases of *Paruvathy* v. *Krishnan* [1983] 2 M.L.J. 121; *and Mok Deng Chee* v. *Yap Swee Hoi* [1981] 2 M.L.J. 321. It was here that the landlords might have been confused when they filed this appeal as they did. Each of the two distinct principles, if found applicable, can protect a person in occupation of land, from being turned out of possession, by the land owner. If a case comes within the ambit of the principle of the court enforcing an agreement as one for a lease in equity, a tenant may ask the court to grant him specific performance of such an agreement. If a case, on the other hand, comes within the scope of the other principle of an equity arising from expenditure of money by one person on land of another person because of reliance on that other person's encouragement, then a person in occupation of the land in question may ask the court for such equity to be satisfied. *Inter alia,* the court may have this equity satisfied by allowing the person in occupation to remain on the land so long as he desires as in the case of *Inwards* v. *Baker (supra)* or by allowing that other person to recover the land from the person in occupation by requiring further that other person to make appropriate recompense to the person hitherto in occupation as was done in the case of *Khew Ah Bah* v. *Hong Ah Mye* [1971] 2 M.L.J. 86. Both principles sometimes are applicable in the same case. In such event, a person in occupation of land, faced with an eviction action for example, would have two shields instead of one to defend himself with or to counter-attack the other. A person so in occupation, it goes without saying, must come to equity with clean hands, *e.g.* he should not be guilty himself of any breach of any condition of an agreement for which he seeks specific performance *i.e.* that he must bring himself within the circumstances which will invite a Court of Equity to so intervene on his behalf."

The case of *Siew Soon Wah* v. *Yong Tong Hong*[1] referred to by the learned Judge is particularly important because of the reference therein to the case of *In re King's Leasehold Estates*[2] wherein it was held that the landlord who had let certain premises had no right to raise rent or to give notice to quit so long as the tenant paid rent when due, the agreement being in writing. The landlord also agreed verbally with his tenant that he the landlord would allow the tenant to remain in the premises for such term as the tenant might desire to be tenant. A railway company agreed to buy the tenant's interest and then disputed that he had any interest.

Malins V.C. said:

> "... upon the principle I am perfectly satisfied that a tenant who has an agreement with his landlord that the landlord will not turn him out so long as he pays the rent, has the right to retain possession as long as the landlord's interest exists."

That decision would support the view that there are two distinct principles each one of which if found applicable, can protect a person in occupation of land from being turned out by the landlord. The other principle is that explained by Lord Kingsdown in *Ramsden* v. *Dyson*[3] in these words:

> "If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. ...".

I would also refer to the note headed "Equities" on pages 402 and 403 of the book called *National Land Code* by Judith Sihombing. That passage deals with what we know as equitable estoppel.

I would therefore with respect agree with the learned Judge that "a person in occupation of land, faced with an eviction action for example, would have two shields instead of one to defend himself with ...", and the principle of equitable estoppel therefore applies in favour of the respondent should he bring himself within the protection of either one of these two shields.

The Federal Court decision affirmed by the Privy Council in *United Malayan Banking Corporation Bhd. & Anor.* v. *Pemungut Hasil Tanah, Kota Tinggi*[4] was touted as an authority for the proposition that equitable remedies are for all practical purposes no longer applicable in land matters. However, an article in the [1985] 2 C.L.J. at pages 298 to 304 by Associate Professor Mohd. Akram gives a lucid exposition of the extent to which the door to reception of equity in land matters has been closed.

It should be borne in mind that the *United Malayan Banking Corporation* case centres on whether in the face of specific provisions under the National Land Code for forfeiture, the courts may yet exercise their inherent equitable jurisdiction to grant relief.

The facts before us are quite different and I would with respect say that section 3(1)(a) of the Civil Law Act 1956 (Act 67) remains applicable, there being nothing in the National Land Code restricting the applicability of the doctrine of equitable estoppel thereto.

There is in the appeal before us nothing to suggest that the application of equitable remedies would result in "overriding expressly enacted legislative provisions," which in the *United Malayan Banking Corporation Berhad* case both the Federal Court and the Privy Council found so repugnant.

I would therefore dismiss this appeal with costs.

Seah S.C.J.: The only question raised in this appeal was whether the High Court was right to apply the principle of equitable estoppel to the facts of this case.

The relevant facts are that on March 31, 1962 an agreement in writing was entered into between Tan Kwan, the landlord (since deceased) of the one part and Hoong Bee & Co., the tenants (respondents herein) of the other part, whereby the tenants were let into possession of the whole of the ground floor of the shop premises known as No. 171-D, Jalan Rahang, Seremban, at the monthly rental of $170.00 as from April 1, 1962. Clause 2 provides that "So long as the tenants shall pay the monthly rental of the demised premises punctually and promptly on the first day for every month and in any event not later than the fourteenth day of any month, and strictly adhere and abide by the terms and conditions contained herein, the tenants shall enjoy uninterrupted occupation of the demised premises, and the landlord shall not hinder, obstruct or determine the tenants' right to such enjoyment under any circumstances." This agreement shall be binding on the heirs, executors, administrators and assigns of the landlord and also on the successors, administrators and executors of the tenants [see clause 7]. The respondents went into occupation of the shop premises and paid the monthly rent of $170.00 to the landlord, Tan Kwan. After the death of Tan Kwan, the appellants became the registered co-owners of the shop premises and accepted the rent tendered by the respondents. As a result, the legal relationship of landlords and tenants was created between the parties. It was conceded that the written agreement of March 31, 1962 was never registered at the Land Registry office.

The appellants claimed that the respondents were monthly tenants and on May 19, 1978 they instructed solicitors to send a notice to quit to the respondents terminating their tenancy on July 31, 1978. When the respondents refused to vacate from the shop premises the appellants took action in the Magistrate's Court at Seremban for an order for possession and other incidental reliefs.

The crux of the defence of the respondents was that by reason of they having paid $9,000.00 as premium to the late Tan Kwan they were given a tenancy in term of clause 7 aforesaid. Even though the agreement of March 31, 1962 was not registered they contended that they were induced by the late Tan Kwan to pay the money over in the expectation of being allowed to stay there indefinitely so long as they paid the rental regularly. They therefore invoke the principle of equity to protect them so that an injustice might not be perpetuated by the appellants who are the successors-in-title of the shop premises. In support of this proposition the learned counsel for the respondents cited the cases of *Siew Soon Wah & Ors.* v. *Yong Tong Hong*[1] and *Tan Swee Hoe Co. Ltd.*

v. *Ali Hussain Bros.*[5] In *Siew Soon Wah case* the tenant (Yong Tong Hong) was requested by the then landlord (Siew Kim Chong, deceased) to pay $8,000 on his behalf to the building contractor. The tenant was then let into occupation of the ground floor at the rent of $150.00 per month; later raised to $200.00 each month. An agreement was entered into whereby the landlord agreed to give a permanent tenancy or a tenancy as long as the tenant wishes to occupy the ground floor. It was also agreed that the landlord should not increase the rent as he liked or eject the tenant. The shophouse was subsequently transferred by the first landlord to the present landlords, Siew Soon Wah and others without notice of the unregistered agreement. The new landlords demanded an increase of the rent and on the tenant's refusal to agree, gave notice terminating the tenancy. The new landlords then brought an action for possession and the High Court gave judgment in their favour holding that the tenancy was for an infinite period and was void under section 30 of the Contracts (Malay States) Ordinance 1950. On appeal to the Federal Court it was held that as the tenant had expended money on the land of another in the expectation of being allowed in occupation, equity would protect his occupation of the land. The Federal Court further held that it would give effect to the expressed intention of the parties by holding that the tenancy agreement was one for the grant of as long a lease as the law allows, which under the provision of section 221(3)(b) of the National Land Code 1965 would be for a maximum period of thirty years. On further appeal to the Privy Council the decision of the Federal Court was upheld.

In *Tan Swee Hoe case* the learned trial judge found that the appellant/landlord had orally agreed to allow the respondents/tenants to occupy the premises for so long as they wished on payment of $14,000.00 as "tea-money". Two written agreements of tenancy were later executed but they did not refer to the landlord's promise. A dispute arose as to payment of rent and the landlord eventually sued for possession, arrears of rent, mesne profits and damages. In their defence the tenants claimed that under the oral agreement they were entitled to stay in the premises as long as they wished and so long as they paid the rent regularly. The learned trial judge dismissed the landlord's claim and ordered the landlord to register a lease in favour of the tenants for 28 years. The landlord appealed and the question that arose was whether the evidence of the oral promise could be given in view of sections 91 and 92 of the Evidence Act 1950. The Federal Court held that an oral promise, given at the time of contracting which induces a party to enter into a contract overrides any inconsistent written agreement. The device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement. In my opinion, *Siew Soon Wah case* and *Tan Swee Hoe case* merely reiterate and apply the principle of equity succinctly stated by Lord Kingsdown in *Ramsden* v. *Dyson*[3] in the following words:

> "If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, *lays out money upon the land*, a Court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision of *Gregory* vs. *Mighell* 34 E.R. 341 and, as I conceive, is open to no doubt."

This passage was expressly affirmed and approved by the Privy Council in the case of *Plimmer* v. *Wellington Corporation.*[6] The principle was again approved and applied by the Privy Council in *Ahmad Yar Khan* v. *Secretary of State for India*[7] and in *Chalmers* v. *Pardoe.*[8]

Both the trial Magistrate and the learned judge of the High Court seem to take the view that the payment or non-payment of the $9,000.00 by the respondents to the late Tan Kwan was immaterial. At page 35 of the Record the trial Magistrate said:

> "On this footing it must be stated that the finding of this court, as regards the payment or non-payment of the $9,000.00 tea-money in the present case, is immaterial."

And at page 61 the learned judge said:

> "Thus it will be seen that failure to call the witness in question to prove the payment of "tea-money" would not deprive the tenants in any way of the right to remain in occupation of the premises in question conferred on the tenants by the agreement in question."

With respect, I am unable to agree with this view. In my judgment, both the trial Magistrate and the High Court had misapprehended the principle of equitable estoppel enunciated by Lord Kingsdown in *Ramsden* case and explained by the Privy Council in *Chalmers* case and *Swee Soon Wah* case, by the Federal Court in *Tan Swee How case* and the Court of Appeal in *Inwards* v. *Baker.*[9]

In my opinion, in order to raise the equitable

estoppel against the appellants it was incumbent upon the respondents to show that in 1962, they were induced by the late Tan Kwan (landlord) to pay over the $9,000.00 to him under an oral agreement or promise that the respondents would be allowed to remain in the ground floor of the shop premises as long as they liked subject only to the payment of the monthly rent regularly and promptly. The onus of establishing this payment and oral promise rested on the respondents and on the findings of the courts below, I had no difficulty in coming to the conclusion that they had failed to discharge it.

In my opinion, the facts of this case are governed by *Lee Ah Low* v. *Cheong Lep Keen & Anor.*[10] – a majority decision of the Federal Court, where the headnote reads:

"In this case certain premises in Malacca had been let by one Toh Kim Soon to the appellant for a term of 80 years on a monthly rent of $100.00. The agreement was not by deed nor was it registered. The appellant went into occupation and paid the monthly rent. Subsequently the land was sold to the respondents who then gave a notice to quit to the appellant terminating his monthly tenancy on April 30, 1969 or at the end of the period of the tenancy expiring next. The learned judge held that the appellant held the land under a tenancy and that this tenancy had been effectively put an end to by the notice to quit."

On appeal to the Federal Court it was held by (Suffian and Ali F.JJ., Ong C.J. dissenting) that the written agreement was void as a lease; that the learned trial judge was correct in holding that the tenancy was a monthly one and this had been effectively terminated by a valid notice to quit.

It was common ground that the agreement in writing dated March 31, 1962 was void as a lease on the ground of non-registration. Applying the principle propounded in *Lee Ah Low* case to the facts herein, we are of the opinion that since the respondents had entered into possession under a void lease without any objection from the late Tan Kwan, the legal relationship of landlord and tenant arose and the respondents became tenants at will. When the respondents tendered and paid the rent monthly which was accepted by the landlord, the tenancy at will was converted into a tenancy from month to month. It was subject to this monthly tenancy that the shop premises must be deemed to have been transmitted to the appellants, so that the respondents became a monthly tenant of the appellants. This monthly tenancy, in my judgment, had been duly determined by the notice to quit of May 19, 1978, and there was no valid defence to the claim of the appellants. As the plea of equitable estoppel also failed, I would allow the appeal, set aside the judgments of the courts below and enter judgment in favour of the appellants. Having regard to the circumstances of this case, I order the respondents to deliver up vacant possession of the ground floor of the shop premises known as No. 171-D, Jalan Rahang, Seremban to the appellants within three months from date hereof. I also order mesne profits at the rate of $170.00 per month to be paid by the respondents to the appellants as from August 1, 1978 until possession is given to the appellants. The appellants are awarded costs of this appeal as well as costs in the High Court and the Magistrate's Court to be taxed. The deposit of $500.00 to be refunded to the appellants.

Hashim Yeop A. Sani S.C.J.: It is not in dispute that the appellants were the registered proprietors of the premises and that the agreement executed between the appellants and the respondents was not registered. The question is whether the agreement is enforceable in equity.

At the outset it should be noted that in the statement of defence the respondents stated in paragraph 3(ii) as follows:

"that by reason of the Defendant having paid $9,000.00 as premium to the said deceased which sum the Defendant does not want to claim back herein or hereafter, *had created in the Defendant an interest and or a tenancy in law and in equity* that so long Defendant was not in breach of the payment of all the month rentals regularly as and when they became due, as stated in paragraph 2 of the said Agreement, the Defendant was to enjoy uninterrupted occupation of the demised premises without any hindrance, obstruction, or determination of the Defendant's right to such enjoyment under any circumstances by the said deceased." (emphasis provided)

In his evidence (at page 10) DW1, the proprietor of Hoong Bee & Co., said:

"Before we entered into the written agreement, we had had discussions. The terms were that the monthly rental be $170/–, that I paid $9,000/– as tea-money and the landlord should not interfere into my occupation so long as I did not default in my rental."

Parties are bound by their pleadings. Since the payment of $9,000/– which was alleged to have created the equity had not been satisfactorily proved the respondents cannot rely on equity to retain possession of the premises.

It can be observed quite clearly that in tenancy cases in this country the equity which is invoked to assist the tenant is the type of equity described in the passage of Lord Kingsdown in *Ramsden* v.

Dyson[3] which is reproduced in the judgment of Seah, S.C.J. It is where the holder of the equity is said to have been induced to act to his detriment in the expectation of retaining possession for as long as the period that the law may allow. Thus the golden thread that runs through all the main cases decided by our courts in enforcing a lease void for non-registration is the "expenditure element" incurred by the tenant in expectation of a long lease.

In *Margaret Chua* v. *Ho Swee Kiew & Ors.*[11] the proprietor of the premises borrowed money from the would be tenants and agreed to grant a lease and also agreed not to dispose of the premises without giving the tenants the option to purchase the premises. Similarly in *Siew Soon Wah & Ors.* v. *Yong Tong Hong*[1] the tenant paid the landlord $8,000/– as consideration for permanent tenancy and the Privy Council said that the tenant had paid $8,000/– for a long tenancy and there arose an equity or equitable estoppel protecting the tenant's occupation for the maximum period permitted by law, *i.e.* 30 years.

I do not think *In re King's Leasehold Estates*[2] should be applied here because there the railway company, desiring to use the premises, entered into an agreement with John King to purchase the interest claimed by him in the premises and contracted to pay £470 for the interest. John King then delivered to the railway company a copy of the agreement executed by Thomas Warren and Charles King referred to earlier. The railway company thereupon alleged that according to the true construction of the agreement John King was a tenant from year to year only and had no other interest in the premises. I think crucial in the decision making process in that case was the question raised by Sir R. Malins V.C. at page 525:–

"First of all this is not an arbitration, but a deliberate agreement entered into by the tenant King of the one part and the railway company, by Mr. Clifton, their agent, of the other part, and I must assume that the company knew the nature of the interest when the contract was entered into, and they deliberately contracted to pay him £470 for that interest. They come now and say that he had no interest whatever. I think that is not open to them, but if it was open to them, can they with propriety say it?"

In a case of this nature, I would endorse fully what Ong C.J. said in the Federal Court in *Siew Soon Wah*[1] at page 107:–

"Every case must, of course, be decided according to its peculiar facts. *The distinction must be drawn between cases where the tenant can resist his landlord's claim on equitable grounds and others where he has no such grounds.* An example is *Lee Ah Low* v. *Cheong Lip Kien* (1970] 1 M.L.J. 7) a recent decision of this court. There the tenant was given a tenancy for 80 years during which period the landlord agreed not to increase the rent unless the assessment rate was raised by the Municipality and the tenant was at liberty to use the premises for carrying on any type of business. The monthly rent was $100 and the tenant was given a month's notice to quit. *No equity had been created in his favour,* as in *Inwards* v. *Baker* ([1965] 2 W.L.R. 212, 213) by his going into possession. Accordingly the sole question to be determined was whether the premises were held under a yearly or monthly tenancy by reason of the lease being void for non-registration."

(emphasis provided)

The conclusion is therefore very simple. Since the respondents here had failed to show that an equity had been created in their favour what becomes evident from the undisputed facts is a monthly tenancy terminable with one month's notice.

I agree therefore with my learned brother Datuk George Seah S.C.J. that the appeal should be allowed with costs here and below.

Appeal allowed.

Solicitors: *Arifin & Partners; Gill & Tang.*

WISMA PUNCA EMAS SDN. BHD. v. DR. DONAL R. O'HOLOHAN.

[S.C. (Wan Suleiman, Seah & Wan Hamzah S.C. JJ.) March 6 & October 18, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 109 of 1985]

Torts – Nuisance – Cause of action founded on natural right of support – Statement of claim based on negligence – Nuisance not specifically pleaded – Defendants not prejudiced – Judgment given for actionable nuisance – Appeal dismissed.

Practice and Procedure – Pleadings – Whether parties bound by their pleadings – Negligence – Nuisance – R.H.C. 1980, 0.20 r.5.

In this case the appellant and respondent were registered owners of adjoining landed properties in Seremban. As a result of development works carried out on the appellant's land the respondent took out a writ against them claiming *inter alia,* damages and also prayed for an injunction. The case against the appellant was summed up in the statement of claim as follows: "The indiscriminate excavation and removal of earth, stone and clay from the defendants' property without ensuring sufficient support for the adjoining properties and without taking sufficient precautions and providing adequate support or otherwise has